

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ONLINE HEALTHNOW, INC., and)	
BERTELSMANN, INC.,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No.: N19C-07-025 EMD CCLD
)	
CIP OCL INVESTMENTS, LLC, CIP)	
CAPITAL FUND, L.P., JUSTIN)	
LIPTON, KEVIN FORMICA, PATRICK)	
SHEAHAN, and TODD WILSON,)	
)	
Defendants.)	

Submitted: January 24, 2020

Decided: May 28, 2020

*Upon Defendants' Motion to Transfer Venue or in the
Alternative, Dismiss Plaintiffs' Complaint*
GRANTED, in part, and DENIED, in part

Philip Trainer, Jr., Esquire, Marie M. Degnan, Esquire, Ashby & Geddes, Wilmington, Delaware, Scott A. Schwartz, Esquire, Andrew Zimmitti, Esquire, Manatt, Phelps & Phillips, LLP, Washington, D.C., *Attorneys for Plaintiffs Online Healthnow, Inc. and Bertelsmann, Inc.*

Rudolf Koch, Esquire, Travis S. Hunter, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware, Jeffrey B. Korn, Esquire, Alexander L. Cheney, Esquire, Willkie Farr & Gallagher LLP, New York, New York, *Attorneys for Defendants CIP OCL Investments, LLC, CIP Capital Fund, L.P., Justin Lipton, Kevin Formica, Patrick Sheahan, and Todd Wilson.*

DAVIS, J.

I. INTRODUCTION

This is a breach of contract action assigned to the Complex Commercial Litigation Division of the Court. On July 2, 2019, Plaintiffs Online Healthnow, Inc. and Bertelsmann, Inc. (collectively, "Bertelsmann") filed a complaint (the "Complaint"). Through the Complaint, Bertelsmann asserts various tort and declaratory judgment claims against Defendants CIP OCL

Investments, LLC, CIP Capital Fund, L.P., Justin Lipton, Kevin Formica, Patrick Sheahan, and Todd Wilson (collectively, “Defendants”). All of Bertelsmann’s claims arise out of or in connection with the sale of CIP OCL Holdings, Inc. (“OCL Holdings”) pursuant to a Stock Purchase Agreement, dated August 20, 2018, by and among CIP OCL Investments, LLC and Online Healthnow Inc. (the “Agreement”).

On September 13, 2019, Defendants filed a Motion to Transfer Venue, or, in the Alternative, Dismiss Plaintiffs’ Complaint (the “Motion”). Bertelsmann responded (the “Response”) to the Motion on October 31, 2019. Defendants filed a reply (the “Reply”) on December 3, 2019. The Court held a hearing on the Motion, the Response and the Reply on January 24, 2020 and, after the hearing, took the matter under advisement. For the reasons set forth below, the Court will **GRANT** the Motion to the extent it asks for this civil action to be transferred to the Court of Chancery and will **DENY** the Motion as to all other requests for relief.

II. RELEVANT FACTS

According to the Complaint, Bertelsmann purchased, through the Agreement, all of the outstanding shares of OCL Holdings, Inc. from CIP OCL Investments, LLC on November 1, 2018.¹ OCL Holdings, Inc. conducts business through a subsidiary, OnCourse Learning Corporation.² OnCourse Learning Corporation provides online educational courses to professionals in certain industries.³

The Agreement contains a forum selection clause. Section 11.6 provides:

Each party hereby irrevocably agrees that any action, suit or other proceeding arising out of or relating to this agreement or any transaction contemplated hereby shall be brought in the Delaware Court of Chancery and any state appellate court therefrom within the State of Delaware (or, if the Delaware Court of Chancery declines to accept jurisdiction over a particular matter, then any state or federal

¹ Compl. at ¶ 1.

² *Id.*

³ *Id.*

court with the State of Delaware), and each Party hereby submits to the exclusive jurisdiction of such courts in any such suit, action or other proceeding...Each party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or another proceeding arising out of or relating to Agreement or any transaction contemplated hereby in such courts, and hereby irrevocably and unconditionally waives and agrees not to plead or claim in any such action, suit or other proceeding brought in any such court has been brought in an inconvenient forum.⁴

The Agreement also provides, in Section 11.9, that it is to be governed by and construed in accordance with Delaware law.⁵

Bertelsmann filed this civil action in this Court and not the Court of Chancery.

III. DISCUSSION

Under Delaware law, the Court may interpret an unambiguous contract as a matter of law by giving clear and unambiguous terms their plain and ordinary meaning.⁶ In interpreting a contract, the Court “give[s] priority to the intention of the parties,” beginning with the “four corners of the contract.”⁷ To uphold the parties’ intentions and give effect to the contract in its entirety,⁸ a court must construe the contract “so that all of its provisions may be read together and harmonized.”⁹ The meaning inferred from a particular provision “cannot control the meaning of the entire agreement where such inference runs counter to the agreement’s overall scheme or plan.”¹⁰

Delaware courts may “consult extrinsic evidence secondarily to confirm” that the contract language evidences the “shared intent of the parties” when they entered the contract.¹¹ Moreover, “[s]ituations exist[] where the court may ‘consult undisputed background facts to

⁴ *Id.*, Ex. 1 at Sec. 11.6 (“Consent to Jurisdiction; Service of Process”).

⁵ *Id.*, Ex. 1 at Sec. 11.9 (“Governing Law”).

⁶ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

⁷ *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).

⁸ *E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

⁹ *Cerberus Int’l, Ltd. v. Apollo Mgmt., L.P.*, 1999 WL 33236239, at *4 (Del. Ch. Nov. 4, 1999).

¹⁰ *E.I. du Pont*, 498 A.2d at 1113.

¹¹ *Fox v. Paine*, 2009 WL 147813, at *5 (Del. Ch. Jan. 22, 2009), *aff’d*, 981 A.2d 1172 (Del. 2009).

place the contractual provision in its historical setting without violating’ the principle that the court not consider extrinsic evidence when interpreting an unambiguous contract.”¹²

Delaware law also provides that “[t]he Court should give effect to private agreements’ terms to resolve disputes in a contractually-designated judicial forum, out of respect for the parties’ contractual designation.”¹³ The Court “should decline to proceed where the parties agreed that litigation should be conducted in another forum.”¹⁴

Utilizing these accepted principles, the Court finds and holds that the Section 11.6 of the Agreement is not ambiguous. Any action, suit or other proceeding arising out of or relating to the Agreement should have been filed in the Court of Chancery.¹⁵ The Court, therefore, holds that Bertelsmann should have, in the first instance, filed this civil proceeding in the Court of Chancery.

Bertelsmann contends that the filing of this action in the Court of Chancery would be a futile act. To support this contention, Bertelsmann relies upon *Helix Generation LLC v. Transcanada Facility USA, Inc.*¹⁶ In *Helix*, the Court of Chancery addressed a contract provision substantially similar to Section 11.6. The Court of Chancery decided that transfer of the action to this Court was appropriate after reviewing the jurisdictional allegations of plaintiff’s complaint and the contractual provision. Plaintiff had argued that, with an amendment to its complaint and jurisdictional discovery, a basis for statutory jurisdiction, 8 *Del. C.* § 111(a)(2)(iii)

¹² *Id.* (quoting *Eagle Indus. Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997)); *see, e.g., Wilm. Firefighters Ass’n, Local 1590 v. City of Wilm.*, 2002 WL 418032, at *7-9 (Del. Ch. Mar. 12, 2002) (considering which party’s “interpretation makes commercial sense” in light of negotiation history).

¹³ *Haney v. Blackhawk Network Holdings, Inc.*, 2017 WL 543347, at *5 (Del. Super. Feb. 8, 2017) (internal citation omitted).

¹⁴ *Double Z Enterprises, Inc. v. Gen. Marketing Corp.*, 2000 WL 970718, at *2 (Del. Super. June 1, 2000).

¹⁵ Compl., Ex. 1 at Sec. 11.6 (“Consent to Jurisdiction; Service of Process”).

¹⁶ 2019 WL 2068659 (Del. Ch. May 10, 2019).

(“DGCL Section 111(a)(2)(iii)”), may have existed.¹⁷ As noted by the Court of Chancery, DGCL Section 111(a)(2)(iii)

...gives jurisdiction [to the Court of Chancery], concurrently with the courts of law, to ‘interpret, apply, enforce or determine the validity’ of an agreement ‘by which a corporation agrees to sell, lease or exchange any of its property or assets,’ and which provides ‘by its terms’ for stockholder approval of the transaction.¹⁸

The Court of Chancery, however, held that DGCL Section 111(a)(2)(iii) sets out discretionary, and not mandatory jurisdiction and that the exercise of determining jurisdiction would be inefficient in a situation where this Court clearly had jurisdiction.¹⁹ As such, the Court of Chancery transferred the civil action to this Court.

The Court finds the well-reasoned decision in *Helix* to be very helpful here. The decision in *Helix* did not provide a *per se* invalidation of provisions like Section 11.6. In addition, the Court of Chancery did not hold that parties should violate their contractual obligations under consent to jurisdiction provisions and file in this Court. The *Helix* decision, instead, provides guidance on how a party seeking jurisdiction in the Court of Chancery under a provision like Section 11.6 should set out its complaint—*i.e.*, plead facts that show how DGCL Section 111(a)(2)(iii) is implicated and why the Court of Chancery should exercise its discretionary jurisdiction.

The Agreement provides that “any action, suit or other proceeding arising out of or relating to this Agreement or any transaction contemplated” by the Agreement “shall be brought in the Delaware Court of Chancery.”²⁰ Section 11.6 goes on to specify that only “if the Delaware Court of Chancery declines to accept jurisdiction” may such action, suit or other

¹⁷ *Id.* at *2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Compl., Ex. 1 at Section 11.6 (“Consent to Jurisdiction; Service of Process”).

proceeding be brought in this Court.²¹ The Complaint's claims all appear to arise out of or relate to the Agreement. By filing in this Court, Bertelsmann disregarded Section 11.6 which requires that its claims first be asserted in the Court of Chancery. The Court notes, however, that nothing in this record demonstrates that Bertelsmann did so in bad faith. The *Helix* decision had just been issued and Bertelsmann seems to have anticipated a similar "side trip" like the one in *Helix* and wanted to avoid delay.

IV. CONCLUSION

Accordingly, the Court finds that cause exists and will grant, in part, the Motion to the extent it seeks a transfer of this civil action to the Court of Chancery. The Court will deny, without prejudice, the Motion's request to dismiss the Complaint for failing to state a claim upon which relief can be granted. Defendants can, if they wish, make those arguments in the Court of Chancery at the appropriate time.

IT IS HEREBY ORDERED that: (i) the Motion is **GRANTED**, in part, and **DENIED**, in part; and (ii) the Prothonotary should **TRANSFER** this civil action to the Court of Chancery under 10 *Del. C.* § 1902 which provides that "...no civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter ... Such proceeding may be transferred to an appropriate court for hearing and determination ..."²²

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: The Prothonotary
File&ServeXpress

²¹ *Id.*

²² 10 *Del. C.* § 1902.